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United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

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INTRODUCTION

Appellant respectfully requests the court to reconsider its opinion that the indictment states sufficient facts to charge appellant with a crime based upon the additional authority not heretofore cited and set forth herein.

If appellant be imprisoned, only time will tell the extent to which this has been a capital case. Imprisonment has been adopted by society because it inflicts physical and mental punishment upon the imprisoned.

Appellant's resources in this regard have been almost exhausted by her age. The Court is in turn urged to exhaust every rational consideration of this indictment and the proof that could be adduced in support of it as it relates to appellant.

I.

Each accused who is to be imprisoned for conspiracy to commit mail fraud or fraud in the sale of securities, must himself be directly charged with the act of having devised or intended to devise a described scheme to defraud and with particular acts and intent setting forth his employment of that scheme in the sale of securities.

In *Stokes v. U. S.,* 15 S. Ct. 617, 157 U.S. 187, 39 L. Ed. 667, the Supreme Court had precisely before it the sufficiency of an indictment charging conspiracy to use the mails to defraud. The Court is requested to compare the language of this indictment with the language of the indictment in the cause at bar as it pertains to appellant, as well as to consider the views expressed in this decision by the Supreme Court upon the requisites of a consipracy indictment.

In 157 U.S. 187 at page 188 the Supreme Court states as follows:

> "We agree with the defendant that three matters of fact must be charged in the indictment and established by the evidence. (1) That the person charged must have devised a scheme or artifice to defraud. (2) That they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the Post Office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such

person must have either deposited a letter or packet in the Post Office, or taken or received one therefrom.

"So also a conspiracy to commit such offense must state a combination between the defendants to do the three things requisite to constitute the offense. In this particular the indictment charges that the defendants 'did then and there conspire, combine, confederate, and agree together to commit the act made an offense and crime by Section 5480 . . . that is to say, the said defendants conspired . . . and agreed together in devising, and intending to devise, a scheme and artifice to defraud various persons, firms, and companies out of their property, goods and chattels, and particularly to defraud, (here follows the names of certain individuals and firms,) and other persons, firms, and companies to the grand jury unknown, of their goods and chattels.'

". . . the indictment continues as follows: 'The scheme and artifice to defraud as aforesaid was *to be carried out* by each of said defendants representing himself to be engaged as a dealer in various kinds of merchandise . . . and the said defendants were *mutually to represent each other* . . . as financially responsible . . . *to be further effected* by ordering merchandise . . . having no intention . . . to pay for such merchandise . . .' etc.

"We think this states with sufficient clearness the first requisite of an indictment under Section 5480, of a scheme or artifice to defraud. The allegation is not of what was actually done, but of what the defendants conspired and intended to do."

Since the foregoing citation contains its own emphasis, appellant did not add any so as avoid confusion, but she wishes to restate two particular portions of this decision:

From the first paragraph:

> ". . . the *person charged* must have devised a scheme or artifice to defraud." (emphasis added) and

From the second paragraph:

> "So also a conspiracy to commit such offense *must state a combination between the defendants to do the three things* requisite to constitute the offense." (emphasis added)

Appellant respectfully submits that it is not possible to draw from this indictment that she *combined, confederated, and agreed in devising a scheme and artifice to defraud.* It is not possible, insofar as appellant is concerned, to find language in the indictment in the case at bar comparable with the following language of the indictment in the *Stokes* case, supra:

> "That is to say, the said *defendants conspired . . . and agreed together in devising, and intending to devise,* a scheme and artifice to defraud various persons, firms, and companies out of their property, goods and chattels . . ."; (emphasis added)

The precise language of the first paragraph of the first substantive count in the case at bar charges the devising of the scheme, and the intention to devise the scheme, as follows:

> "The defendant, Edgar Robert Errion, also known as Bob Errion, Glen R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, and Howard Martin, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Co-operative, hereinafter called 'purchasers,' by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the

pretenses, representations, and promises would be false when made."

Appellant respectfully submits that *only those charged as above with having devised or intended to devise a scheme or artifice to defraud can be said to have combined and confederated to do so.* Or, to put it conversely and with reference to the proof, without allegations of fact that appellant devised and intended to devise such a scheme, it was not possible for proof to be adduced that appellant was one of a number of persons who devised and intended to devise such a scheme. The indictment in the case at bar cannot be reconciled with the statement of the Supreme Court in the *Stokes* case, supra, that the person charged with the substantive offense *must have devised or intended to devise a scheme or artifice* to defraud and that a conspiracy count must state a combination between *the defendants (all of them) to devise a scheme or artifice to defraud.*

* * * * *

Of course, what is stated in the *Stokes* case, supra, is nothing other than what the statutes involved require.

The Mail Fraud Statute, 18 USCA Section 1341, says the criminal is:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department . . .";

and the Securities Act, Section 77q(a), 15 USCA, says the criminal is:

> "Any person (who) in the offer or sale of . . . securities . . . by the use of mails—

1. (Employs) any devise, scheme or artifice to defraud, or
2. (Obtains) money . . . by means of any untrue statement . . . or
3. (Engages in) any . . . practice . . . which operates . . . as a fraud or deceit upon the purchaser."

Admittedly, there can be no distinction in guilt, when a substantive offense is charged under either of these statutes, between the one who devises the scheme and the one who aids in the employment of the scheme, but the crimes to be charged, if they are to be found guilty of these statutes, *are the crimes denounced by these statutes.* The indictment must charge that the accused, *having devised or intending to decise a scheme or artifice to defraud,* used the mails in the course thereof, *or that he employed a scheme or artifice to defraud* in the sale of securities by the use of the mails.

Turning now to a charge of conspiracy to effect these offenses. First, a charge of conspiracy is limited to a conspiracy to commit an offense against the United States (Section 371, Title 18, USCA: "If two or more persons conspire either to commit an offense against the United States . . ."). It follows, therefore, that the indictment is necessarily limited in its description of the substantive offense to be described as the object of the conspiracy, to a crime denounced by a substantive statute of the United States; in this instance, *having devised and intending to devise a scheme or artifice to defraud,* using the mails in the course thereof, and *employing* a scheme or artifice to defraud in the sale of securities by use of the mails.

The conspiracy count, however, of this indictment charges that appellant, with seven others:

> "did conspire, combine, confederate, and agree with each other to commit the following crimes . . . against the United States:
>
> "violations of Section 1341 Title 18 . . . by using . . . the mails of the United States for the purpose of executing the scheme and artifice to defraud . . . *described in the first count* of this indictment, which is here and now realleged and incorporated by reference;"
>
> "Violations of 77q(a) Title 15 . . . by employing said scheme and artifice to defraud . . . *as described in the preceding counts* of this indictment and hereby incorporated by reference;" (emphasis added)

(It is patent, of course, that a mere change of wording in the conspiracy count, when it charges a conspiracy to violate Section 1341, Title 18 USCA "by using and intending to use the mails of the United States for the purpose of executing the scheme" described in the previous counts, instead of charging a violation of that section by devising and intending to devise a scheme to defraud and using the mails in the course thereof, cannot and does not alter the actual nature of the substantive offense as denounced by the substantive statute that must be found as the object of the conspiracy.)

Now then—precisely what is incorporated into the foregoing allegations when the request for incorporation by reference is obeyed?

Appellant, Errion, Munkers, Bones, Lock, Wright, Montgomery and Martin are charged with having "conspired, combined, confederated, and agreed" to violate

Section 1341, Title 18, by combining to devise a scheme and using it to defraud; "that is to say" (to borrow from the language of the indictment in the *Stokes* case, supra) Errion, Munkers, Bones, Wright, Lock, Montgomery, and Martin, but not Appellant, did devise and intended to devise a scheme and artifice to defraud and with the intention upon their part that the mails be used; the said scheme "to be carried out" by Errion, Munkers, Bones, Wright, Lock, Montgomery, and Martin, and not Appellant, making various representations and controlling a corporation and having it engaged in transactions with the Cooperative by means of which they could siphon off large sums of money to their benefit.

Appellant, Errion, Munkers, Bones, Lock, Montgomery, and Martin are likewise accused of having "conspired, combined, confederated, and agreed" to violate Section 77q(a) Title 15, USCA, by combining to employ said scheme in the sale of securities by mail; "that is to say," Errion, Munkers, Bones, Wright, Lock, Martin, and Montgomery, but not Appellant, having devised a scheme and artifice to defraud, employed said scheme and artifice upon purchasers in the sale of memberships in this Cooperative by the use of the United States mail in the fashion in which Errion, Munkers, Bones, Wright, Lock, Montgomery, and Martin are charged with having done so under the substantive counts.

The contradiction is obvious.

Contrast the language of the indictment in the *Stokes* case, supra, wherein "the said defendants conspired, combined, confederated, *and agreed together in*

devising and intending to devise, a scheme and artifice to defraud." Try as one may one cannot make the conspiracy count in the case at bar read that Errion, Munkers, Bones, Lock, Wright, Montgomery, Martin *and appellant,* combined, confederated, conspired, and agreed *to act together in devising and intending to devise a scheme to defraud, based upon this incorporation,* for according to the incorporated matter, appellant had no part in devising or intending to devise to the scheme.

Try as one may (and this is of particular importance because the Court has indicated that appellant's connection with scheme was in its employment) one cannot make this conspiracy count read that Errion, Munkers, Lock, Bones, Wright, Montgomery, Martin *and appellant,* combined, confederated, conspired, and agreed to *employ* this scheme in the sale of securities by mail, based upon this incorporation, for according to the incorporated matter appellant *is not said to have had any part in its employment,* as well as not being charged with having devised it.

Compare appellant's position with that of the seven other defendants, who are properly charged with having *"conspired, combined, confederated, and agreed" to act together in devising and intending to devise the scheme and artifice to defraud that each of them is charged with having devised and intended to devise by the allegations of the substantive counts.*

Appellant does not believe that the Court is in disagreement with her when she asserts that the conspiracy count must set forth in allegations of fact the

object and purpose of the conspiracy so that a court can ascertain that this object was the violation of a Federal Statute. As appellant understands this Court's present position, it is that the incorporation by reference accomplished this purpose.

But does it, as to appellant?

Perhaps it has been conceived that while the others might be charged with having combined in devising a scheme to defraud, appellant can be charged with having combined with them to carry their scheme into effect. Such *facts* might support a conviction for conspiracy when the latter is properly charged, but there is no such charge in itself. According to the statutes and the *Stokes* case, supra, one must be *charged with the acts constituting the conspiracy as a whole* even though one's actions may only be a part in effecting its object, and the charge must be couched as *personal acts* showing an *equal responsibility for an intention to accomplish the particular substantive offense involved.*

This indictment wants to charge appellant with equal responsibility for devising this scheme, but *actually places that responsibility elsewhere.* It wants to charge appellant with equal responsibility for employing the scheme but actually places *that* responsibility elsewhere.

Is not the nub of the matter this: There are no such things as acts and intent showing guilt of the intention to "conspire, confederate, combine, and agree" to commit a substantive offense, independent of and completely separate from, any acts or intent towards accomplishment of the substantive offense. Appellant contends

there is no such thing as an accused who has "combined, confederated, and agreed" to employ a scheme to defraud if the allegations of fact do not say how and when they personally employed it. How can there be allegations of fact to support proof otherwise? Particularly, when as here, the combination to defraud as to appellant's co-defendants is to be drawn from allegations of their individual acts of fraud alleged as coincident.

Of course, appellant must acknowledge that this court has already expressed itself as being of a similar view when it has so far upheld appellant's conviction upon the basis that the evidence showing her "connection with the scheme" was sufficient to show that she was one of the "parties to a conspiracy to defraud."

But are there allegations of fact by which her "connection with the scheme" was alleged against her?

The court has referred in its opinion to the allegations of the substantive counts that describe the use by the defendants accused thereby of a corporation known as the Davenport Corporation.

Of course, this court did not say these allegations of fact are charged against appellant, but is it fair, in this, a criminal prosecution, to point to these allegations of the substantive counts and to say to appellant that she should have been able to deduce therefrom that these acts were acts charged against her and committed upon her part? Can an issue of fact of criminal responsibility upon appellant's part truly be drawn from these allegations? Off hand, for example, is not a corporation a separate entity, and is not guilt personal?

Was she really supposed to conclude that while under the substantive counts her co-conspirators were charged in plain English with controlling this corporation; incorporation of this allegation into the conspiracy count charged her with controlling it? That while under the substantive counts her co-conspirators alone caused the corporation to enter into a contract with the Cooperative, when that allegation was incorporated into the conspiracy count, she was the one at fault?

If there were no conspiracy count, would this court countenance appellant's imprisonment under the substantive counts as they are charged? That is, without her being an accused and that count containing on its face no allegations of fact against her? What magic enables her to be imprisoned under them by virtue of their incorporation into the conspiracy count?

Must it not be acknowledged, in all fairness, *that controlling this corporation to an illegal end and causing it to execute a contract in furtherance of a scheme to defraud are the issues of wrongdoing in this regard,* and that they are *not* charged against appellant?

Are we not ultimately required to recognize that the allegations of the substantive counts are only allegations of fact charged against those charged therein, and that even when incorporated into the conspiracy count they can be no different than they are?

II.

Appellant's contentions further explained in the light of the Court's comment upon them in its opinion.

This court in its opinion states, apropos of appellant's arguments concerning this indictment:

> "Appellant seems to argue that because she was not charged with any offenses in the first twelve counts of the indictment that she was therefore acquitted of those charges and that proof of the facts alleged therein cannot be used as establishing overt acts of the conspirators."

Since this is not what appellant intended to argue, she wishes to respectfully attempt to correct this impression.

Her argument was that it is uniformly recognized that an acquittal upon the substantive counts and a conviction upon a conspiracy count which incorporates the allegations of the substantive counts to provide its material allegations, is an inconsistent verdict, whether the acquittal be regarded as a true finding of fact as to the substantive counts from which an inference of guilt of the conspiracy count was to be drawn, and controlling over conviction for the latter, or an act of leniency on the part of the jury and thus not a true finding and not so controlling.

Appellant sought to establish the analogy between this inconsistency and the indictment in the case at bar where appellant is not charged at all in the substantive counts, even though, in like fashion, as in those cases, the conspiracy count relies upon the substantive counts for its material allegations.

Can appellant's statement that the conspiracy count relies upon the substantive counts for "material allegations" be challenged?

If she had in fact been charged in those counts, and acquitted of them, this court would have pointed out, as it has done in analogous cases in the past, that the acquittal was no more than an act of leniency on the part of the jury; that did not speak their true mind as to her innocence of the facts charged therein as shown by their conviction upon the conspiracy count, and that therefore the acquittal would not affect the conviction.

Does not an accused in such a case say to the Court: "I was acquitted of the substantive counts which charged me with doing those acts from which my guilt of the conspiracy counts was to be inferred, and therefore no such inference of my guilt of the conspiracy count can be made?"

And does not the Court, according to these decisions, reply: "It is true that in order to find you guilty of the conspiracy count the jury had to conceive of your being guilty of doing the acts charged against you in the substantive counts. They could arrive at your guilt of the conspiracy count in no fashion. Therefore, we hold that they did so find, their express finding upon the substative counts notwithstanding, for that was an act of leniency they were not empowered to exercise."

Is there not legitimate cause, therefore, for appellant to say to this court that since she was not charged at all in the substantive counts, that therefore there were

no facts put in issue from which her guilt of conspiracy could be inferred? Is there not at least some apparent merit to her contention?

At least, no court has ever stated in the instance of such an inconsistent verdict; "That there is no matter of inconsistency presented; that whether the accused be found guilty or innocent of the substantive counts is completely aside from the matter under consideration; *that indeed, it makes no difference whether the accused himself is even charged at all with acts toward the accomplishment of a substantive offense,* it being sufficient only that somewhere in the indictment there be a description of a substantive offense for the use of the conspiracy count, whether it be described as the acts of others than the accused or the accused in fact be innocent thereof. The verdict of the jury embraces all things necessary to reach that verdict and once a verdict has been had, the actual allegations of the indictment can be said to pass from the picture. Only the practical question remains: Will the evidence support the verdict? And as to this, because of the very nature of the cause, a great deal must be viewed as being within the sound discretion of the jury."

This is not, of course, what the Courts have said, either in these cases or in those cases cited in appellant's opening brief where the Courts, including this one, have held that the facts of a substantive count are so deeply and genuinely involved in a conspiracy count as to render a trial and acquittal upon a substantive offense res ajudicata as to the facts as to a subsequent indict-

ment for conspiracy to commit that substantive offense, and a bar to such subsequent indictment.

Therefore, appellant contended that the allegations of the substantive counts set forth in the first paragraph of the first count, which describe the object and purpose of any alleged conspiracy to be covered by this indictment, were necessary and material allegations of the conspiracy count; allegations to be made, as such, against *any accused who was to be convicted of a conspiracy to effect them.* It was only in a secondary fashion that appellant objected to proof of those counts as overt acts; that is, that no proof of such overt acts upon the part of her co-conspirators would be admissible against her until a conspiracy agreement had first been proven upon her part. Since all of the allegations of fact as to the object and purpose of the conspiracy are in the substantive counts, and since proof is limited to evidence in support of allegations of fact, appellant contended that the point could never be reached under the substantive counts at which it could be said a conspiracy could be said to exist of which she was a part and at which proof under the conspiracy count could be adduced of any overt acts of her alleged co-conspirators set forth in the substantive counts.

* * * * *

It is stated in 15 CJS, Conspiracy, Section 82, page 1114:

> ". . . Charge of a conspiracy to defraud necessarily involves a combination to accomplish a fraud."

This is a truism with which there can be no disagree-

ment. Appellant, Helen A. Davenport, is not charged with *acts* showing she was a part of a combination to accomplish a fraud by these allegations. After the evidence is in, one learns that the accused could not have controlled the Davenport Corporation except by controlling her, and that they could not have caused it to execute a contract with the Cooperative, except by obtaining her signature, but one can learn nothing at all about Helen A. Davenport from these allegations of the indictment themselves.

In *U. S. v. Falcone,* 109 F. 2d 579, at page 581 (Second Circuit, 1940), the court states:

> ". . . so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

A prosecutor may have his regrets that he did not name appellant as an accused in the first substantive count or that he did not include her name in the body of that count by stating that the accused therein devised and intended to devise this scheme "together with one Helen A. Davenport," when, with hindsight, he views the reaction of the jury to his evidence; but as the allegations of this indictment now read, appellant is one being swept "within the dragnet of conspiracy" as one whose association with the "main offenders" is apparently the negative inference that those who controlled this corporation and caused it to perform the

acts alleged (for their benefit) must have had either the guilty or innocent cooperation of the unknown persons who were this Corporation's officers (if they were other than themselves), to accomplish this. This circumstance renders this indictment such an "all comprehensive indictment" as to be staggering in its oppression.

* * * * *

Perhaps this is a helpful view of the matter. In *Deaton v. Commonwealth,* 295 So. 169, 220 Ky. 343, the Court divides the indictment into two parts, one of which it refers to as the *accusatory* part, and the other of which it refers to as the *descriptive* portion. The crime meant to be charged in that case, as here, was criminal conspiracy. In 220 Ky. at page 345 the Court quotes the indictment as follows:

> "The accusatory language of the indictment says: 'The grand jury of Perry County, in the name and by the authority of the Commonwealth of Kentucky, accuses Matt Deaton and James Boggs of the crime of confederating, committed in the manner and form as follows, to-wit:'

The court then cites two Kentucky statutes that parallel the intent of the VI Amendment to the Constitution of the United States (. . . the accused shall enjoy the right . . . to be informed of the nature *and* cause of the accusation), and Rule 7 (c) of the Federal Rules of Criminal Procedure. One is quoted as follows:

> "The indictment must be direct and certain as regards . . . the offense charged."

And the other of which as follows:

> "The indictment must contain . . . a statement of the acts constituting the offense, in ordinary and

concise language, and in such manner as to enable a person of common understanding to know what is intended . . ."

Upon page 345, the Kentucky court states:

"The first requirement . . . we have . . . held . . . to be the *accusatory* part of the indictment, which is that part where the offense is named, and the second requirement should appear in that part of the indictment designated as its *descriptive* part . . . a good statement of the offense in the *descriptive* part . . . will not supply the failure to *name* the offense in the *accusatory* part . . . and, vice versa, a correct naming of the offense in the *accusatory* part of the indictment will not supply a defective statement of the acts constituting the offense in its *descriptive* part."

So also this court in *Elder v. U. S.*, 142 F. 2d 199, states upon page 200:

"an indictment is a formal accusation of a person charging that he has committed an illegal act which is denounced by the sovereign as a crime. It must indicate the crime charged, and it must contain a statement of the essential elements of the indicated crime. It must include a recital of the acts alleged to constitute the offense in detail sufficient to bring them within the scope of the offense and *sufficient to inform the accused generally of the acts attributed to him* and the time of their commission so that he may adequately defend against the charge and so that he may be safeguarded against double jeopardy." (emphasis added)

Granted that the indictment, being "in the usual form," properly indicates the offense as charging that the nine defendants did "conspire, combine, confederate, and agree with each other to commit the following crimes and offenses against the United States:", where

in the case at bar, is the "descriptive part" of the indictment sufficient "to inform the (appellant) generally of the acts *attributed to (her) and the time of their commission* so that she may adequately defend against the charge?"

If, as stated in *Stokes v. U. S.,* supra, the indictment must state a combination between the defendants *to do* the three things requisite to constitute the substantive offense, or, if, as more particularly stated in 15 CJS, Conspiracy, supra, the charge of a conspiracy to defraud necessarily involves a combination to *accomplish* a fraud, where are the allegations of fact descriptive of her participation in a combination to accomplish a fraud?

To "combine, confederate, agree, and conspire" may correctly name a crime, and as the name of the crime, it may be the ultimate fact to be proven, just as murder, rape, and arson are likewise both the name of a crime and the name of the ultimate fact. But appellant needs no citation of authority that an indictment is defective that charges only that the accused "committed murder within this county and state," with no allegations descriptive of the means by which he committed the crime, or the time and place and the name of his victim. Just because conspiracy is a crime that means the accused operated in conjunction with others, and others are likewise accused of the crime, doesn't mean that the *accused's own crime* can be described as to time, place, object, and means, completely and totally in terms of the acts and intent of those others. Somewhere, some place, the indictment must set forth facts descrip-

tive of the accused's own personal conduct beyond the mere name of the crime. He must have a fair opportunity to defend against *his own* conduct specified against *him*.

Please do not say to appellant that it was alleged as descriptive of the acts attributed to her that she caused the Davenport Corporation to execute a contract by means of which large sums of money were siphoned off to her benefit, or that the indictment alleged that she arranged for purchase of real property in that corporate name and later resold it to the Cooperative at a large profit to herself and her corporation.

Had such accusations been made by the indictment she could have defended against them by producing the witnesses for the prosecution who were in fact produced for the purpose of supporting the allegations that this contract was caused to be executed by others than herself and that the moneys paid pursuant thereto were delivered to and received by others than herself. She could also have offered the testimony the Government offered that her participation in the real property transaction was mechanical only. If she had been accused in the substantive counts, and the proof thereof had to be interpreted as set forth in the allegations of ultimate fact now appearing in the substantive counts as they are (i.e., that Errion, Munkers, Lock, Bones, Wright, Montgomery, and Martin were the ones *who controlled* this corporation, and that Errion, Munkers, Lock, Bones, Wright, Montgomery and Martin were the ones *who caused it to execute this contract,* who

caused it to siphon off sums of money for *their* benefit, etc.), she could have moved for acquittal upon those charges upon the ground that the evidence was either equivocal or contrary to her guilt, and that a conviction based thereupon would either be contrary to the evidence, or based upon speculation only.

In any event, her Counsel could have argued to the jury that she was innocent of these substantive counts upon the basis of such testimony so as to obtain their conclusion that she was not guilty of those counts for its important worth in considering whether or not she could be said to be guilty of the conspiracy count.

Can she possibly be said to have had a fair trial otherwise?

Perhaps the court feels that the jury would still have convicted her, but at least, when the jury entered the jury room, they would not have commenced their deliberations as to her upon the premise that it could be conceded that she was not charged with acts of participation leading to conviction of the substantive counts as such, and that even such a view of her participation in the conspiracy could be taken as that her co-conspirators were the only ones criminally responsible for what she did in furtherance of their accomplishment of the substantive offenses, but that she could still somehow be found guilty of being a "conspirator" or they would not have been asked to pass upon her guilt as a "conspirator."

III.

It is undeniable that appellant is not charged by this indictment in precisely the same fashion as her co-defendants. The issue thus presented is one of the utmost importance to the law of conspiracy and to criminal jurisprudence generally.

There are certainly only two ways in which the crime of conspiracy can be proven: either by direct evidence or by indirect evidenct. Direct evidence would consist of oral or written testimony of the accused's agreement to participate in the commission of an offense. Indirect evidence consists of his actual participation in an offense from which an inference of his agreement can be drawn. Indeed, this Court, as has already been pointed out, has so far sustained appellant's conviction upon the basis of evidence showing her "connection with the scheme."

Appellant stands upon the proposition that her "connection with the scheme" was neither properly nor adequately alleged in allegations of fact charged against her, or even alleged at all.

The matter presented is one of the utmost importance to criminal jurisprudence. If appellant can be convicted of conspiracy upon proof adduced in the course of evidence being submitted to the jury to prove allegations of facts charging others with having devised and intended to devise such a scheme, a new doctrine in the law of conspiracy will be introduced.

In *Krulewitch v. U. S.,* 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, Mr. Justice Jackson states in the first paragraph of his concurring opinion as follows:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comments because it is characteristic of the long evolution of that elastic, sprawling, and pervasive offense. Its history exemplifies the 'tendency of a principle to expand itself to the limit of its logic.' The unavailing protests of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

Upon page 449:

> ". . . even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case."

And upon page 454:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."

Upon page 446 there is cited the report of the Conference of Senior Circuit Judges, presided over by Chief Justice Taft, in 1925, as follows:

> "We note the prevalent use of conspiracy indictments for converting a joint misdemeanor into a felony; and we express our conviction that both for this purpose and for the purpose—or at least with the effect—of bringing in much improper evidence, the conspiracy statute is being much abused.
>
> "Although in a particular case there may be no

> preconcert of plan excepting that necessarily inherent in mere joint action, it is difficult to exclude that situation from the established definitions of conspiracy; . . ."

Appellant respectfully submits that every fault referred to by Mr. Justice Jackson and the report of this conference is embraced in the cause at bar.

The "uneasy seat" of the co-conspirator is extended in this cause to the indictment itself. Here, appellant does not merely sit by while evidence is adduced of the acts of others in order to color her own acts openly alleged against her; she must sit by while evidence is adduced of the acts of others offered to prove allegations of fact made against others in the first instance and purporting to cover the whole crime; the existence of a conspiracy, its object, those parties to it and the acts they committed from which their intent to combine to commit a wrongdoing is to be inferred; which, when proven against those so charged are then supposedly proven against her.

In the *Krulewitch* case, supra, conviction was reversed because there was admitted into evidence a conversation between the accused's alleged co-conspirator and a complaining witnss that was in the nature of an admission against interest but that occurred after the accused was indicted and long after it had to be acknowledged that the conspiracy, if any had ever existed, had terminated.

What can be said of appellant's position in this trial? What is to be said of the evidence admitted to prove that Errion, Munkers, Wright, Bones, Lock, Montgom-

ery, and Martin devised and intended to devise, and to employ, a scheme and artifice to defraud in the fashion that their acts and intent are described in the allegations of the first paragraph of the first substantive count?

Was it evidence against appellant when introduced? Certainly not as such. If not, when did it later become evidence admissible against her? *How was the evidence adduced under the substantive counts that those defendants devised such a scheme "linked up" with itself under the conspiracy count so as to be expanded to embrace appellant?* As it was introduced, it was effective to prove, against those accused in the substantive counts, that they combined, confederated, and agreed as alleged in the conspiracy count, to act and perform as was proven against them under the allegations charged against them in the substantive counts; and indiscriminately, whether that evidence showed they were responsible upon the substantive counts either for actually having devised this scheme and having supervised carrying it into effect (Errion) or upon the basis that they only subsequently participated in its employment (Martin); but what allegations of fact could be proven against appellant as these allegations of fact against her co-defendants were being proven?

That she "combined, confederated, and agreed?" This may be the assertion of the conspiracy count, but by what acts alleged and proven against her, and against which she had opportunity to defend, in like fashion that acts were alleged and proven against her co-defendants under the substantive counts against which they had the opportunity to defend?

It is a physical fact, a matter of plain English, that this indictment charges appellant differently than her co-defendants. As to each of the others, the incorporation by reference requested by the conspiracy count incorporates allegations couched as acts of their own and of one another. As to appellant, the incorporation incorporates allegations couched only as the acts of her alleged co-conspirators.

It is logically impossible that this difference be *no* difference. There must be some necessary purpose served by the incorporation of these allegations or they would not have been incorporated. The incorporation cannot possibly serve that purpose as to appellant in *precisely the same fashion* as it does the others.

It may be contended that they serve that purpose in a *sufficent* fashion but it cannot possibly be contended that they serve it in the *same* fashion.

To determine whether or not they do in fact serve that purpose in a sufficient fashion, two things are to be ascertained: First, the purpose served as to appellant's co-defendants and second, the fashion in which this purpose is then served as to appellant. The purpose served as to her co-defendants was not merely to set forth overt acts, which could be attributed to any co-conspirator once the conspiracy was established. It was meant to incorporate the facts from which the existence of the conspiracy itself was to be established; the personal acts of each of the accused from which it could be inferred that a crime was intended to be committed by those acts and from which it could be further inferred for the purpose of the conspiracy count,

that each person so accused had necessarily combined with the others equally accused so as to effect a combination of the whole to accomplish the same. After all, each can be imprisoned only for *his own crime*. The conspiracy count incorporates the allegations of fact of the substantive counts so that there can appear in the conspiracy count the personal, individual acts showing an intent to devise a scheme to defraud and to employ it in the manner described, charge as such, upon the part of each person accused under the conspiracy count of having done the same in combination, confederation, conspiracy, and agreement with others, so that he can be found guilty of a crime he personally committed and charged as such against him.

The difference between the fashion in which this incorporation serves to fulfill that purpose for appellant's co-conspirators and the fashion in which it purports to fill that purpose as to appellant, is that there do not appear in the conspiracy count by virtue of this incorporation by reference, equal personal acts as to appellant, as there are to the others, showing an intention to devise such a scheme and to carry it into effect.

If this incorporation by reference was not meant to supply such allegations as to the alleged co-conspirators, what was its purpose? Certainly not merely to supply overt acts, for the courts have held many times that there is a distinction between overt acts and the allegations of the object and purpose of the conspiracy. The accused's agreement is his crime, described in terms of the accused's acts and intent to combine, confederate, agree and conspire to accomplish a substantive

offense. In the final analysis, each co-conspirator must be found *guilty of his own crime.*

Grant only that appellant's "connection with the scheme" had to be alleged in allegations of fact charged against her, even if only in the broad form of having her included as an accused in the first paragraph of the first substantive count, or in the particular form of having her charged with particular acts of wrongdoing by name therein, and it is apparent that there are no such allegations of fact contained in this indictment.

Deny that her "connection with the scheme" need be alleged and the floodgate is opened. Anyone can be tacked onto a conspiracy count, like an afterthought; their's not to fight the open battle that they committed no acts towards accomplishing a substantive offense in combination with others, for there are no allegations of fact charging them with acts towards the accomplishment of the substantive offense; their's only to wait till the prosecution has rested for opportunity to prove that they did not "combine, confederate, agree, and conspire" concerning the substantive offense of others; whatever that may be to the accused, to the jury, and to the court, under evidence adduced in the absence of such allegations against the accused and in the presence of such allegations against others.

This, appellant respectfully petitions the court, is not in accord with American justice.

Respectfully submitted,

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